

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>THOMAS B. LOYA</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>KAW VALLEY DRAINAGE BOARD</b>	)	
Respondent	)	Docket No. 1,009,091
	)	
AND	)	
	)	
<b>CONTINENTAL WESTERN INS. CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Claimant requested review of the May 30, 2006 Award by Administrative Law Judge Robert H. Foerschler. The Board heard oral argument on August 29, 2006.

**APPEARANCES**

Conn Felix Sanchez of Kansas City, Kansas, appeared for the claimant. Steven J. Quinn of Kansas City, Missouri, appeared for respondent and its insurance carrier.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument before the Board, the parties agreed that should the issue of timely notice be decided in claimant's favor, the case should be remanded to the Administrative Law Judge (ALJ) for a determination of the remaining issues.

**ISSUES**

The claimant alleged he suffered a series of repetitive injuries to his low back until he was placed on light-duty work on June 27, 2002. The ALJ found the claimant did not provide timely notice of his accidental injury and therefore benefits were denied.

The claimant requested review and, as previously noted, the parties agreed the primary issue is whether claimant provided timely notice and, if so, the case will be remanded to the ALJ for determination of the remaining issues.

Respondent notes that upon appeal from the preliminary hearing order in this case the Board determined claimant failed to provide timely notice. Respondent argues there is no additional evidence to prove claimant gave timely notice to the respondent.<sup>1</sup> Respondent further argues the ALJ's Award should be affirmed.

The issue for Board determination is whether claimant provided timely notice.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It is undisputed claimant suffered a work-related injury to his lower back when he fell at work in October 1996. Claimant was provided conservative medical treatment for approximately six weeks and then released to his regular job duties without restriction. Claimant admitted he never made written claim for compensation for the 1996 accident.<sup>2</sup>

Claimant continued working and never requested that respondent provide any additional medical treatment for his back. Approximately a year after claimant was released to return to work he sought treatment for his back from his family physician but never advised respondent that such treatment was due to the 1996 work-related injury.<sup>3</sup> Claimant continued to receive occasional medical treatment for his back from 1997 through 2002.

On June 27, 2002, claimant's family physician provided restrictions against lifting more than 10 pounds and respondent provided claimant with light-duty work. Claimant testified that although he could not remember when, nonetheless, he told his supervisor that his back problems were work related. He further testified:

Q. (Mr. Quinn) Okay. I want to make sure I understand. It's your testimony that you told Ernie Quinto, the gentleman sitting here next to me, that when you were getting medical treatment for your back in '97, '98, '99, 2000, 2001, and 2002 that that was because of your on-the-job injury?

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<sup>1</sup> It should be noted that, pursuant to K.S.A. 44-551(b)(2)(A), an appeal from a preliminary hearing order is heard and decided by a single Board member. As mandated by K.S.A. 44-555c(k) an appeal from a final award is determined by all 5 Board members. Consequently, upon review of a final award, even if the same evidence is introduced at both the preliminary and regular hearing, a different decision is possible because all 5 members of the Board review and determine the final award.

<sup>2</sup> P.H. Trans. at 26.

<sup>3</sup> *Id.* at 19.

A. (Claimant) Yes.

Q. So for all that period of time Ernie should have known this was a work-related injury?

A. I don't know if he knew all that period of time. I don't know if I told him back that many years ago, but I know I mentioned it to him. Now, whether he remembered or not, I don't know.<sup>4</sup>

Claimant's supervisor and friend, Ernest P. Quinto, agreed claimant had complained about back pain but denied claimant said it was work related. Instead Mr. Quinto testified:

Q. (By Mr. Quinn) If you could, tell the judge when this happened.

A. June the 27th when the restriction was imposed on Tom from a doctor.

JUDGE FOERSCHLER: This one right here (indicating)?

THE WITNESS: Yes.

A. Just before that Tom told me he was going to go to the doctor to seek some advice on what was wrong and came back and showed me that he was on restricted light duty.

Q. (By Mr. Quinn) And was there any discussion whether this was caused by the on-the-job --

A. Oh.

Q. By an on-the-job injury or not?

A. Not on the job, he told me it was not on the job.<sup>5</sup>

Claimant remained on light-duty work and received conservative treatment. At the end of December 2002, the respondent sent a letter advising claimant that he was being given a leave of absence. In February 2003, claimant had a posterior decompressive laminectomy with an instrumented fusion and iliac crest bone graft. Claimant agreed that he never requested that respondent provide treatment or pay for the surgery.<sup>6</sup>

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<sup>4</sup> *Id.* at 19-20.

<sup>5</sup> *Id.* at 36-37.

<sup>6</sup> *Id.* at 27.

Between 1996 and the surgery in 2003, the claimant had additional work-related injuries to his knee, his chest and also suffered a burn injury. Claimant requested and respondent provided authorized medical treatment for those injuries.

The controlling issue is whether claimant provided timely notice of injury. K.S.A. 44-520 requires notice of accidental injury be given to the employer within 10 days. The time for giving notice can be extended up to 75 days for just cause. Claimant alleges he told his supervisor that his continuing back problems were work related. Claimant's supervisor denies that he was told claimant's back problems were work related and instead alleges that claimant specifically denied his back problems were caused by work.

After the preliminary hearing, the claimant again testified that he "believed" he told Mr. Quinto that his ongoing back problems were related to his fall at work in 1996.<sup>7</sup> He further testified that he never told anyone else his back problems were work-related. And although claimant testified that his back condition worsened from 1997 through 2002, he never requested medical treatment nor light-duty work.

At the regular hearing the claimant introduced a page, dated November 15, 2001, from a daily journal he allegedly kept which contained a notation that he told Mr. Quinto that his back "hurts from first injury when I fell."<sup>8</sup> But Mr. Quinto again testified that claimant did not tell him that his back complaints were work-related and, instead claimant told Mr. Quinto that his condition was not work-related.<sup>9</sup>

As noted by the ALJ, the claimant deposed the administrator and several board members for the respondent. None had received notice from claimant of a work-related back injury. And claimant testified that the only person he notified was Mr. Quinto.<sup>10</sup>

It is significant to note that throughout the intervening years after his initial back injury in 1996 the claimant sought and received medical treatment for his back but he never requested that respondent provide that treatment. But when he suffered other work-related injuries during this time period he requested and received treatment from the respondent for those injuries. Moreover, claimant agreed that he never requested respondent provide treatment for his back even after surgery was recommended. This supports the supervisor's testimony that claimant never provided notice that work was causing his back problems.

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<sup>7</sup> Loya Depo. (Apr. 25, 2003) at 26, 53.

<sup>8</sup> R.H. Trans., Cl. Ex. 1.

<sup>9</sup> Quinto Depo. at 11.

<sup>10</sup> Loya Depo. (Apr. 25, 2003) at 55.

Based upon review of the entire evidentiary record, the Board finds the greater weight of the credible evidence fails to support claimant's contention that he told his supervisor that his injury was work related. Accordingly, the Board finds claimant has failed to meet his burden of proof that he provided timely notice as required by K.S.A. 44-520 and affirms the ALJ's Award.

**AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Robert H. Foerschler dated May 30, 2006, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of October 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Conn Felix Sanchez, Attorney for Claimant  
Steven J. Quinn, Attorney for Respondent and its Insurance Carrier  
Robert H. Foerschler, Administrative Law Judge